Supreme Court, U.S.
FILED
NOV 29 2006
OFFICE OF THE CLERK

No. 06-427

IN THE

Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, OHIO HIGH SCHOOL ATHLETIC ASSOCIATION AND THE KENTUCKY HIGH SCHOOL ATHLETIC ASSOCIATION IN SUPPORT OF PETITIONER

STEVE CRAIG
437 Market Avenue
Canton, OH 44702-1543
(330) 456-0061

PHILLIP D. SCOTT
THEODORE R. MARTIN
GREENEBAUM, DOLL & MACDONALD, PLLC
300 W. Vine Street
Suite 1100
Lexington, KY 40507
(859) 231-8500

EDMUND J. SIKORSKI, JR.
Counsel of Record
EDMUND J. SIKORSKI, JR., PC
3300 Washtenaw Avenue
Suite 240
Ann Arbor, MI 48104
(734) 677-2110

QUESTION PRESENTED

Amici will address the following question, which is framed in Petitioner's second reason for granting certiorari:

> "Whether competitive equity is a substantial state interest."

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. WHY A "LEVEL PLAYING FIELD" MATTERS IN HIGH SCHOOL SPORTS HOW ANTI-RECRUITING RULES HELP 3

II. UNIVERSAL VALUE OF "COMPETITIVE EQUITY" .. 5

III. A SUBSTANTIAL INTEREST EXISTS TO ASSURE THAT COMPETITIVE EQUITY EXISTS AMONG COMPETITORS 10

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Board of Education v. Mergens, 496 U.S. 226, 275 (1990) 10

Brentwood Acad. v. TSSAA, 531 U.S. 288 (2001) 6

Brentwood Acad. v. TSSAA, 180 F.3d 758 (6th Cir. 1999) 3

Brentwood Acad. v. TSSAA, 442 F.3d 410 (6th Cir. 2006) 3

Burrows v. OHSAA, 891 F.2d 122 (6th Cir. 1989) 6

Gutter v. Bollinger, 539 U.S. 306, 328 (2003) 10

Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 273 (1988) 10

Regents of the University of Michigan v. Ewing, 4764 U.S. 214, 226 (1985) 10

Wood v. Strickland, 420 U.S. 308, 326 (1975) 10

STATE CASES

Cardinal Mooney High School v. MHSAA, 437 Mich. 75; 468 N.W. 2d 21 (1991) 12

Reid v. Kenowa Hills, 261 Mich. App. 17 (2004) ... 6,12

State ex. rel. Ohio High School Athletic Association v. Judges, (1962) 173 Ohio St. 239 10

STATUTES

Ohio Rev. Code Ann. § 3313.664 6

COURT RULES

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

BOOKS

William G. Bowen & Sarah A. Levin, *Reclaiming the Game – College Sports and Educational Values* (2003) 5

David Callahan, *The Cheating Culture – Why More Americans are Doing Wrong to Get Ahead* (2004) . 9

Henry Mark Holzer, *The Keeper of the Flame* (2006) .. 4

Richard A. Rasmussen, *The Role of Intercollegiate Athletics in the Academy – A Case Study of the Formation of the University Athletic Association* (1997) 5

Paul Weiler, *Leveling the Playing Field – How the Law Can Make Sports Better for Fans* (2000) 19-20

INTEREST OF AMICUS CURIAE

The respective amici organizations are voluntary associations of high schools in each state that set forth a statement of the consensus of the opinion of its membership as to minimum standards such that athletic competition, which is adversarial by nature, can occur on a somewhat level playing field to accomplish the goal of reasonable, equitable and competitive environments. To that end, every association serves the common needs of member institutions for regulations of athletics while correlating their diverse interests. The mission of each amici is to promote uniformity, predictability and competitive equity in the application of eligibility rules and contests rules for athletic competition.[1]

---

[1] "Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, each amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than the amici and respective counsel make any monetary contributions to the preparation or submission of this brief", and pursuant to Rule 37.2(a) of the Rules of Supreme Court of the United States the amici state that consent by both parties to file this brief on behalf of Petitioner has been granted.

SUMMARY OF ARGUMENT

Competitive fairness is at the core of any truly competitive activity. As oxygen is the life-supporting element in our air, competitive equity is the life-supporting element of organized competitive athletics.

It is the amici believe that competitive equity is so obvious in the nature of competition that it does not require a record of evidence – it is self evident. That competitive equity is a substantial interest of the member schools of a state high school athletic associations is compelling in the fact that:

1. it is a universal value of school sports organization; and
2. it is found in the sports provided on other levels by other sponsors.

The amici submit that the Tennessee Secondary School Athletic Association's petition for a writ of certiorari should be granted and the judgment of the Sixth Circuit should be reversed.

ARGUMENT

I. WHY A "LEVEL PLAYING FIELD" MATTERS IN HIGH SCHOOL SPORTS - HOW ANTI-RECRUITING RULES HELP

The TSSAA has advanced three reasons for the promulgation of an anti-recruiting rule by its member schools and their constituents:

1.To maintain proper perspective – athletics subordinate to academics - in voluntary, competitive interscholastic athletic programs of its member schools.

In its first review of *Brentwood Academy v. TSSAA*, 180 F.3d 758 (6th Cir. 1999), the U.S. Court of Appeals for the Sixth Circuit accepted that the TSSAA membership has a substantial interest in this objective.

2.To protect student-athletes from exploitation.

In its second review of *Brentwood Academy v. TSSAA*, 442 F.3d 410, 426 (6th Cir. 2006) the Sixth Circuit held that the TSSAA membership also has a substantial interest in this second objective.

3.To promote a level playing field – competitive equity – among the member schools which sponsor interscholastic athletic programs.

In its second review, the Sixth Circuit's majority held that the TSSAA membership has a legitimate, but not substantial interest, in this third objective:

> "Carter testified at length about *how* the recruiting rule preserves competitive equity among schools... There is very little, if any, evidence, however, explaining *why* competitive equity is an important value in the first place. It may be true, as defendants claim in their brief, that "maintenance of fair competition among [the TSSAA's] members lies at the core of [the TSSAA's] reason for being," but simply saying this is so does nothing to demonstrate why such a "reason for being" is a substantial state

> interest. State actors may act out of a variety of interests, but only some are substantial. The defendants can cite to no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest, especially when coupled with the admittedly substantial interest of ensuring that athletics do not become more important than academics at the high school level. The district court was right that this interest, while legitimate, is not substantial." *Id* at 426-27 (emphasis added.)

Generally, the rules of voluntary, competitive high school sports and the reasons for those rules are less justiciable issues than policy issues for the participants to decide. Whether or not competitive equity is a legitimate and substantial interest of the schools of the TSSAA versus "merely" a legitimate interest, and whether or not a recruiting rule contributes to the cause of competitive equity, are not questions that belong in a court of law, but are really political in nature and are better resolved by a vote of the organization's voluntary membership than by votes of judges; and just because one voluntary member of an organization has strong feelings about something does not mean that member has grounds for filing a lawsuit and overturning the will of those who adopted the policy. HENRY MARK HOLZER, THE KEEPER OF THE FLAME (2006).

Competitive equity is so obvious in the nature of competition that it does not require a record of evidence. In the dissent to the Sixth Circuit's March 17, 2006 opinion, it is stated:

> "... it can hardly be argued that TSSAA needs to provide evidence for the obvious proposition that more evenly balanced high school football matches are in the public interest."

However, that is what the majority opinion appears to require. This brief provides the rationale, which the dissent recognized as self-evident, but the majority somehow doubted.

II. UNIVERSAL VALUE OF "COMPETITIVE EQUITY"

"When the ball goes up, the pitch is thrown, the whistle blows, or the gun sounds, the outcome should be in doubt." RICHARD A. RASMUSSEN, THE ROLE OF INTERCOLLEGIATE ATHLETICS IN THE ACADEMY – A CASE STUDY OF THE FORMATION OF THE UNIVERSITY ATHLETIC ASSOCIATION 124 (1997).

That competitive equity is a substantial interest of the member schools of a state high school association is compelling in the fact that (1) it is a universal value of school sports organizations across America, and (2) it is found in sports provided on other levels by other sponsors. Sports programs do not survive a season or two, much less a century, without the effort to provide fair competition.

In their book, Reclaiming the Game – College Sports and Educational Value, authors William G. Bowen and Sarah A. Levin write:

> "The hardest thing may be to acknowledge that the good of the whole is not served when teams representing one or two schools in a conference (a Princeton or a Williams) are too dominant for too long. No one wants athletes at such schools to do anything but try their hardest to win every time they compete. But some of the 'rules of engagement' may need to be reexamined to discourage the wrong forms of competition (for example, recruiting ever more specialized athletes) and to encourage situations in which the outcomes of contests are, in Rasmussen's nice phrase, 'always in doubt'." WILLIAM G. BOWEN & SARAH A. LEVIN, RECLAIMING THE

GAME – COLLEGE SPORTS AND EDUCATIONAL VALUES 259 (2003).

This important value is everywhere in sports, and it is most obvious in the fact that in almost every circumstance, schools are classified for state tournaments on the basis of enrollment. Schools of 100 students or fewer do not have a fair chance to succeed against schools of 1,000 students or more. If competitive equity was not an important value, classification on the basis of school size would not be almost universal across the country.

This essential, universal value is found in the on-the-field or court playing rules as well as off-the-field eligibility rules for students, and in both in-season and out-of-season contest and practice limitations.

The need to control student recruitment as a means of promoting competitive equity is also found throughout sports. The recurrent recruiting scandals of college athletics would be Exhibit A. The recurrent investigations of the TSSAA, MHSAA, OHSAA and similar organizations into athletic-motivated transfers and athlete recruitment would be Exhibit B.

In most jurisdictions including Michigan, Ohio and Kentucky, interscholastic athletics may be an important part of the high school experience, but they are neither part of the required curriculum of schools nor an extension of any curriculum course. In Ohio, unlike "the classroom", a student athlete may be suspended from her/his interscholastic sports team without any due process requirements. (See Ohio Rev. Code Ann. §3313.664) No student has a right to participate in extracurricular interscholastic competitive athletics. Interscholastic athletics are not curricular, or even co-curricular; they are extracurricular. (See for example

Reid v. Kenowa Hills, 261 Mich. App. 17 (2004) and *Burrows v. OHSAA*, 891 F.2d 122 (6th Cir. 1989))[2]

These programs are neither essential nor integral to all students' education, but have evolved over decades to become tools by which schools may reach and motivate young people to stay in school, enjoy school and perhaps do better academically than they otherwise might. The programs provide venues for schools to interact with their constituents about a wide variety of topics and build community spirit and loyalty.

Of course, if the playing field for teams is not close to level or if teams have no chance to win and they lose contest after contest year after year, the interscholastic program will not attract participants and spectators, and most of the value of these programs is lost to schools.

Competitive fairness is at the core of any truly competitive activity. It is why both teams in a football game have the same number of players on the field. It is why the goals at either end of a basketball court are the same height. It is why the professional football team with the worst record this fall will have the first draft pick in the spring. It is why every Major League baseball team is

---

[2] In 2001, this Court characterized interscholastic athletics as an "integral" part of public education in Tennessee. [*Brentwood v. TSSAA*, 531 U.S. 288 at 299-300 (2001).] However, just as in Michigan, Ohio and Kentucky there is no state law or State Board of Education regulation in Tennessee requiring any school, public or private, to sponsor interscholastic athletic competition; and there is no state law or State Board of Education regulation requiring any student to participate in a school's interscholastic athletic program. But whether interscholastic athletics is an integral part of public education or not, once the high school decides to sponsor a program of interscholastic athletics, then the interests that are essential to the success of that program are *ipso facto* substantial state interests. And to the extent that this Court may regard interscholastic athletics as an "integral" part of public education in Tennessee, then it is beyond peradventure that the interests that are essential to the success of interscholastic athletic competition are just as "substantial" as the interests that are essential to the success of public education generally in Tennessee.

limited to the same number of players on its roster. It is why every runner in the Boston Marathon runs the same distance over the same course. It is why boxing and wrestling are divided by weight classes. It is why each player in a chess match gets the same amount of time between moves. It is why schools have "junior varsity" games, to allow the less skilled players to compete against players of similar skill levels.

To defend the need for competitive equity in school athletic programs is like defending the need for oxygen in our air. As oxygen is the life-supporting element of our air, competitive equity is the life-supporting element of organized competitive athletics.

Fortunately, there is not a single rule of any athletic organization that must carry the sole burden for promoting competitive equity. The many rules that are codified work together, each contributing a part of what is necessary to achieve the organization's important interests and the intended values of the program: fairness.

One of the rules which contributes significantly to this legitimate and substantial interests of high school athletic associations is the anti-recruiting rule of the TSSAA (and similar rules of the MHSAA, OHSAA and KHSAA).

The dissent in the second Sixth Circuit opinion (March 17, 2006) offers these insights into why the TSSAA membership has a substantial interest in competitive equity which is advanced by an anti-recruiting rule:

> • "Fierce competition among high schools for talented student-athletes, and the demand for success from fans and alumni, bring the potential for excess. As a result, athletic leagues comprised of educational institutions, such as TSSAA, have rules governing both the recruitment of student-athletes and the

> eligibility of student-athletes to participate in athletic contests."
>
> • "Enforcement of the recruitment rule in this case is also clearly warranted because, in the context of athletic competition, the rule is sufficiently related to legitimate public interests and narrowly tailored."
>
> • "It is an off-the-field regulation thought to enhance the quality of on-the-field competition by promoting equity in the relative strength of teams. The anti-recruiting rules, therefore, have ~~a clear~~ relationship, not 'little or no relationship' to participation in TSSAA."

The dissent clearly understood the facts of these universal truths existence: without a level playing field there would be no games and, notwithstanding this fact, there will always be those who seek to tip the balance of "competitive equity" in their favor. The collision course of these two truths leads to the inescapable final truth.

In his 2004 book The Cheating Culture, author David Callahan cites "the effects of inequality" as an important cause of the culture of cheating he describes. He provides evidence that because people perceive that things are not fair (people believe they are disadvantaged and that they do not have an equal chance in life), people believe they have license to ~~cheat, steal~~ and lie. DAVID CALLAHAN, THE CHEATING CULTURE – WHY MORE AMERICANS ARE DOING WRONG TO GET AHEAD 96 (2004).

Without a level playing field in life, bad things happen. Absent a level playing field in sports, similarly bad things happen.

The Sixth Circuit's decision, left unchanged, will foster and promote a cheating culture among high school athletics. If the member schools cannot protect their interest in equal and fair competition by voluntarily joining an association and enacting rules pursuant to an agreed upon political process, then the member schools

will have an incentive to cheat. In fact, by the Sixth Circuit stating that equal and fair competition is not a substantial interest, the member schools may even have a legal justification to cheat. Just as students are not allowed to cheat in the classroom to protect the substantial interest of fair and equal academic competition, schools and coaches should not be allowed to cheat to protect the substantial interest of fair and equal athletic competition. Otherwise, students are being taught that, while fairness and equality may be important, those pursuits are not important.

III. A SUBSTANTIAL INTEREST EXISTS TO ASSURE THAT COMPETITIVE EQUITY EXISTS AMONG COMPETITORS

> "A school's extracurricular activities constitute a part of a school's teaching mission, and the school accordingly must make decisions concerning the content of those activities . . . Absent good reason to hold otherwise, these decisions should be left to teachers." Quoted by Justice John Paul Stevens in *Board of Education v. Mergens*, 496 U.S. 226, 275 n.6 (1990).

The Sixth Circuit has the argument of the TSSAA that the schools of that association have a substantial interest in a "level playing field" for athletic competition. In substituting its opinion for that of the educators who make up the schools of the TSSAA, the two-judge majority opinion has departed from the long experience and best thinking of voluntary high school athletic associations across the country, as well as a wide variety of other athletic organizations in the United States. (See *Gutter v. Bollinger*, 539 U.S. 306, 328 [2003]; *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 [1988]; *Regents of the University of Michigan v. Ewing*, 4764 U.S. 214, 226 [1985]; *Wood v. Strickland*, 420 U.S. 308, 326

[1975] and *State ex. rel. Ohio High School Athletic Assoc v. Judges*, (1962) 173 Ohio St. 239.)

A. Earliest Eligibility Minimums

The history of high school athletics in Michigan, Ohio and Kentucky is not unlike that of Tennessee and most other states. One hundred years ago, when athletic programs were first becoming organized well enough in secondary schools to cause people to wonder how the students of one school might fare against the students of another school, it took but a few experiences of interscholastic competition to realize that a common set of understandings was necessary for the competition to occur with fair result and without hard feelings.

Those who were coordinating these first athletic exchanges quickly discovered that they needed several kinds of rules; and it was not left to a single rule or single kind of rule to promote competitive equity: it was one of the objectives of all of the rules which tended to work together toward the desired outcome of a more level playing field.

The first set of rules needed was to determine where and with what the competition would be conducted: facility dimensions, ball specifications, net heights, etc.

The second set of rules they found necessary was to determine how the competition would proceed: number of balls and strikes and innings, lengths of quarters, halves, etc.

These first and second sets of understandings show there was concern from the very first day of school sports for fairness, for a more level playing field, for competitive balance. The organizers could not have these valued qualities in their contests without these kinds of rules.

But deciding where, with what and how the competition would be played was not enough. Gradually, it became clear to the coordinators of the programs that there had to be some understandings, agreements, policies and rules about who could play.

Not surprisingly, School A soon objected if School B's participants in an event seemed to be men against School A's boys.

Thus, the schools coordinating the events agreed that all participants in all contests had to be enrolled in the schools they represented in competition. These agreements were made long before the amici organizations were formed, but an enrollment rule is still the first regulation of the amici rule books.

They further agreed next that all participants had to fall within a certain age range. An age rule. That is still the second regulation of the amici rule books.

It wasn't fair to have it any other way. Nor was it healthy for participants to have it any other way.

The state athletic associations have endured countless legal battles seeking to strike down these well-established and well-intended rules. For example, the MHSAA successfully defended its enrollment rule in lawsuit which tried to eliminate the enrollment requirement for some young people. See *Reid v. Kenowa Hills*, 261 Mich. App. 17 (2004).

In previous years, the MHSAA had to fight in several courts to keep its age rule. The rule has always prevailed successfully.

In *Cardinal Mooney High School v. MHSAA*, 437 Mich. 75, 82, 468 N.W.2d 21 (1991), the Supreme Court of Michigan held:

> ". . . the interest of uniformity and predictability justify even-handed application of" [the forfeiture rule] . . ."
>
> And
>
> "In light of the unique issues of competitive equity in the area of eligibility rules for athletic contests, [the forfeiture rule] is a valid regulation which neither infringes on the authority of the courts nor improperly restricts access to the judicial system."

It is apparent that schools' interests in having competitive equity for interscholastic athletics are both legitimate and substantial and form the basis for the Michigan Supreme Court upholding the rule in question.

Over the years, member schools of these associations have addressed a variety of eligibility issues that threatened the competitive balance necessary to conduct athletic contests with fair result and without hard feelings: maximum semesters, academic progress, transfers and undue influence (recruitment), for example.

But, if a court can conclude that fair and equal competition in this instance is not a substantial interest, then these other types of rules will undoubtedly be challenged on similar grounds. The state athletic associations must be permitted to enforce these rules or else chaos will reign among high school athletic competition.

B. Earliest Competition Maximums

As interscholastic athletic programs became more sophisticated and took on higher profile within the school, community and state, pressures mounted for athletic teams to do better and win more. As a result, some schools would start practice sooner, play more games and seek more distant and prestigious venues for competition.

Not surprisingly, again, it did not take very long for some schools to complain that other schools in pursuit of competitive advantage were moving toward excesses, were abusing the health and welfare of students and were interfering with the educational objectives of schools.

So again, through political process schools agreed among themselves on some limitations, for example, for the lengths of seasons, number of contests and distances of travel.

As the years have passed, school administrators have found it necessary to adopt starting and ending dates, as well as maximums for the number of interscholastic

scrimmages and contests, for each and every sport season in order to assure that:

- one sport did not conflict with other sports programs in the school;
- no sport interfered with other extracurricular activities of the school; and
- sports did not interfere with the academic mission of the school;

and through their voluntary association, these administrators found it necessary to agree upon statewide maximums in order to promote the important value of fair competition between schools.

School administrators have learned from experience that to maintain competitive equity, it is not only necessary to define the interscholastic season and limit what can occur during it, but also it is necessary to define and limit what can occur out of season. This has become increasingly challenging as school sports have expanded to include sports that were entrenched in community-run programs before they became school programs and as the coaching staffs of schools have had to expand beyond teaching faculty to adults in the community employed outside of schools.

Yet, the Sixth Circuit's decision may undo the years of progress that the schools have made toward putting the health, welfare and education of students above sports.

C. Annual Contract

In Michigan Ohio and Kentucky, schools make the rules for themselves. The rules cover hundreds of policies and procedures for administration of the local programs. Each year in Michigan and Ohio, the member schools renew their membership in the association by adoption by their respective Boards of Education and resolution not only renewing their members, but adopting as their own the same minimum eligibility requirements.

In addition, schools have the option to adopt rules of qualification into the postseason tournaments conducted

by the MHSAA. MHSAA rules – prepared by the elected representatives of member schools (Representative Council) – are not to govern regular season competition but to determine the qualifying standards for MHSAA sponsored and conducted postseason tournaments.

An important benefit is that by adopting these tournament-qualifying rules, schools gain a greater degree of standardization – a more level playing field – for their regular season competition.

For MHSAA member schools, these and other agreements are published in the *MHSAA Handbook*; and each year the local governing boards of member schools sign a Membership Resolution, a contract, that they will enforce those rules locally, while the MHSAA agrees that the rules will not be changed during that year.

Schools do so to keep the program fair. They do so to keep the program healthy for the people involved. They do so to keep the program consistent with the mission of the sponsors: namely, education of students by schools.

Rules do not exist for their own sake, but work in the aggregate to address known problems, to attempt to solve those problems in order to strive to provide the elusive product of a state high school association's work: competitive equity.

D. Current *Handbook*

The Foreword to the *Handbook* of the Michigan High School Athletic Association has for many years included these two paragraphs:

"The MHSAA's primary purpose in promulgation of rules for eligibility minimums and competition maximums is to establish conditions by which students and schools may qualify for MHSAA postseason tournaments – in other words, to promote a level playing field for MHSAA-sponsored tournaments.

"Because entry into the MHSAA's tournaments requires season-long, sometimes school year-long and even year-round adherence to basic rules, member

schools reap an important byproduct: they have some standardized rules for their regular season competition – in other words, a more level playing field for the rest of their interscholastic experience."

The *MHSAA Handbook* has for many years stated the four "Purposes of the Michigan High School Athletic Association, Inc." Included is this:

"3. Promote uniformity, predictability and competitive equity in the application of eligibility rules for athletic contests."

Similarly, promotion of competitive equity is in the stated or implied purpose for or value of the sponsoring organizations of school sports nationwide, including all those high school associations located within the United States Sixth Judicial Circuit.

E. Tournament Classification

It is generally accepted that the schools of Michigan were the first to be divided by school size for season-ending statewide tournaments. Over the years, the number of states with enrollment-based classifications for tournaments has grown to all 50, and the number of classifications within each state keeps increasing. The motivation is that schools value and keep looking for competitive equity – a fair and reasonable opportunity to succeed – in interscholastic athletic tournaments. The phenomenon of enrollment-based classifications for competition has even expanded to non-athletic tournaments and festivals, like band, orchestra, vocal music, speech and debate.

If competitive equity was not valued by the membership of these organizations, classifications would be unnecessary for their competitions. They most certainly would not be found in almost every high school sport in every state.

F. National Federation Playing Rules

The organization that prepares playing rules for most high school sports which govern the vast majority of

interscholastic games and meets is the National Federation of State High School Associations. Its rules committee members are provided a manual that lists ten principles of rules writing, the first and fourth of which are as follows:

"1. FAIR PLAY: The rules, first and foremost, must guarantee fair play. No competitor should gain an unfair advantage over an opponent as a result of a rule of play. This criterion is basic and transcends all other considerations."

"4. BALANCE BETWEEN OFFENSE AND DEFENSE: In all sports, a relationship must be maintained between the offense and defense enabling neither phase of the game to dominate the other."

In other words, fair and balanced competition are goals when promulgating the rules that govern on-field play. Off the field regulations regarding student eligibility and recruitment are no less important in establishing and maintaining competitive equity in school sports.

G. National Federation Eligibility Rules

The National Federation of State High School Associations has a set of eleven "Recommended Minimum Eligibility Standards" for its member high school associations across the country. The eleven include the following:

"9. RECRUITING/UNDUE INFLUENCE: Transfer from one school to another for athletic purposes because of undue influence by anyone connected directly or indirectly with the school shall cause a student to forfeit eligibility for at least one year from the date of enrollment."

Every member association of the National Federation has such a rule, attesting to the universal appreciation of the importance educators have placed on not only discouraging, but also strongly penalizing, recruiting/undue influence.

H. Essential Requirement

The membership of the Michigan High School Athletic Association has adopted a single regulation (Regulation I) with 13 interrelated sections identified as the "Essential Eligibility Requirements for Senior High School Students." One of those "essential" requirements is this:

> SECTION 10 – UNDUE INFLUENCE
>
> "SECTION 10 – The use of undue influence for athletic purposes by any person or persons directly or indirectly associated with the school to secure or encourage the attendance of a student or the student's parents or guardians as residents of the school district shall cause the student to become ineligible for a minimum of one semester and a maximum of one year. The offending school shall be placed on probation for one year and offending coach or coaches shall not be permitted to coach at that school for a one-year period and shall not coach for a one-year period at any other member school in any MHSAA tournament in any sport. Examples of undue influence would include but not be limited to offers of or acceptance of: financial aid to parents, guardians or student; reduced or eliminated tuition and/or fees; any special privileges not accorded to other students, whether athletes or not; transportation allowances; preference in job assignments; room, board or clothing; promotional efforts and admission policies for athletes which are in excess of efforts for other students."

Thirteen interpretations follow to assist in the application of this section.

What is especially noteworthy is that this particular section contains its own penalty. So serious is a transgression of undue influence – it is an error of

commission, not omission – that this section does not defer to the portion of the *Handbook* which deals with penalties (Regulation V). Instead, within the rule itself, it stipulates that, in addition to other penalties, this transgression will result in suspension of students and offending school personnel.

Undue influence does not receive a slap-of-the-hand penalty but the most serious penalties the MHSAA may assess, and represents one of the very few times the eligibility regulation will lead to suspension of the students or staff of member schools, actions usually reserved to the member schools themselves.

A violation of undue influence is a violation of the most serious kind, with specially identified penalties, because it most fundamentally challenges the program's effort to provide – and the member schools' great interest in – equitable competition, as level a playing field as possible, a core value of school sports.

I. Other Levels of Sports

As unique as interscholastic athletic programs are in their guiding philosophies and governing policies, their concern for promoting and protecting a level playing field - competitive equity – is not unique. The concern is found throughout sports of all kinds on all levels.

In Leveling the Playing Field, author Paul Weiler writes:

> ". . . the very existence of a game to play, let alone a championship to savor, requires that he participants cooperate off the field to create a fair and balanced match-up on the field.
>
> "That is way any sports venture must have a league or other body to establish rules for the game that make the contests challenging to players and attractive to spectators."

And

> "It is this intrinsic 'joint product' quality of sports that requires a central organization to set rules about who is eligible to play and how the available talent is to be distributed among teams to ensure balanced competition." PAUL WEILER, LEVELING THE PLAYING FIELD – HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS 2-5 (2000).

Many professional sports leagues have salary caps and agreements to share broadcast and merchandise revenues as a way to level the playing field so the rich don't keep getting richer at the expense of the poorer. Frequently acknowledged as the best run and most successful professional sports league, the National Football League actually gerrymanders each season's schedule so the weaker teams play each other more frequently and the stronger teams less frequently. Their motives may be commercial more than educational, but they share the same interest: competitive equity.

CONCLUSION

Concern for fairness, for competitive equity or balance, for a more level playing field, is found in sports on all levels by all sponsors. Its meaning varies somewhat based on the purpose of the program – e.g., the commercial interests of major college and professional sports versus the educational interests of school sports or the recreational interests of community leagues – but there is a substantial interest at every level that rules be developed and applied that will tend to provide for a fair and sportsmanlike result. Without rules, a level playing field is unlikely. With rules of eligibility and competition, a level playing field is more possible.

Respectfully submitted,

STEVE CRAIG
437 Market Avenue
Canton, OH 44702-1543
(330) 456-0061

PHILLIP D. SCOTT
THEODORE R. MARTIN
GREENEBAUM, DOLL &
MACDONALD, PLLC
300 W. Vine Street
Suite 1100
Lexington, KY 40507
(859) 231-8500

EDMUND J. SIKORSKI, JR.
Counsel of Record
EDMUND J. SIKORSKI, JR., PC
3300 Washtenaw Avenue
Suite 240
Ann Arbor, MI 48104
(734) 677-2110